STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 14, 2003
v MARVIN D. COTTON, Defendant-Appellant.	No. 238216 Wayne Circuit Court LC No. 01-003175

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v ANTHONY T. LEGION, Defendant-Appellant.	No. 239719 Wayne Circuit Court LC No. 01-003175

Before: Kelly, P.J. and Cavanagh and Talbot, JJ.

PER CURIAM.

In these consolidated appeals from a joint jury trial, defendants appeal as of right their convictions of first-degree murder, MCL 750.316 and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced each defendant as a second habitual offender to life in prison without parole for the first-degree murder conviction and two years in prison for the felony firearm conviction. We affirm.

I. Adjournment

Defendant Cotton first argues that the trial court erred in denying his motion for an adjournment to investigate a statement that he allegedly made to a fellow prisoner which the prosecution produced only five days before trial. We disagree.

A trial court's decision whether to grant an adjournment is reviewed for an abuse of discretion. MCR 2.503(D)(1); *People v Jackson*, 467 Mich 272, 276; 650 NW2d 665 (2002). The burden of proof falls on the defendant. *In re Jackson*, 199 Mich App 22, 28; 501 NW2d 182

(1993). Generally, adjournment of a criminal trial is permitted only for "good cause shown." MCL 768.2. In reviewing a trial court's decision to deny a defendant's motion for a continuance, we consider whether the defendant asserted a constitutional right, had a legitimate reason for asserting that right, was negligent in requesting the adjournment, or requested previous adjournments. *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992). In order to prevail on appeal, the defendant must also demonstrate prejudice resulting from a trial court's denial of a motion to adjourn. *Id.*

Defendant Cotton asserts that "numerous constitutional rights were involved" when he was forced to proceed to trial with his counsel unprepared. Defendant Cotton argues that his counsel was unprepared as a result of the prosecution having turned over fellow prisoner Ellis Frazier's statement just five days before trial. Even though the statement itself was turned over five days before trial, the trial court correctly determined that defense counsel's ability to investigate was unaffected. We note initially that long before the written statement was turned over to the defense, the prosecution had identified Frazier on its witness list. Through discovery, defense counsel could have determined how the witness would testify at trial. Additionally, we agree with the trial court that defense counsel was able to investigate this statement during the pendency of trial and further, could address the matter during Frazier's cross-examination. In any event, the statement was not, as defendant Cotton contends, the only evidence against him. Lockhart's testimony also implicated defendant Cotton. Eyewitness Kenneth Lockhart recognized him from previous visits to the home and positively identified him as a perpatrator. Therefore, defense counsel's ability to prepare for trial was not hampered by the trial court's denial of the adjournment. The trial court did not abuse its discretion in denying defendant Cotton's request for an adjournment.

II. Prosecutorial Misconduct

A. 404(b)

Defendant Cotton next argues that he was "denied a fair trial when the prosecutor introduced evidence that [he] was allegedly planning on harming or killing one of the identifying witnesses prior to trial."[1] We disagree.

Appellate review of allegedly improper prosecutorial conduct is forfeited unless the defendant shows plain error that affected his substantial rights. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000), citing *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). The prosecutor's good-faith effort to admit evidence does not constitute misconduct. *People v Noble*, 238 Mich App 647, 660-661; 608 NW2d 123 (1999).

[1] Although defendant Cotton's statement of the issue presented identifies prosecutorial misconduct, the analysis discusses the rules of evidence and the proper admission of evidence under MRE 404(b). But at no point in defendant Cotton's analysis does he take issue with the trial court's admission of the evidence nor does he argue that the trial court erred. In fact, he clearly states "The prosecutor committed misconduct in seeking to have this evidence admitted." Therefore, we address this issue as one of prosecutorial misconduct.

Defendant Cotton argues that the evidence was inadmissible under MRE 404(b)(1) which provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

To be admissible under MRE 404(b), other acts evidence must satisfy three requirements: (1) it must be offered for a proper purpose, (2) it must be logically relevant to a matter at issue at trial, and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). A proper purpose is one other than establishing the respondent's character to show his propensity to commit the offense. *People v Crawford*, 458 Mich 376, 391; 582 NW2d 785 (1998).

At trial, Frazier described what defendant Cotton told him while in a holding cell. Part of Frazier's testimony in this regard was that Lockhart witnessed the crime. Further, Frazier testified: "He had said somebody going to take care of him, and I said like who, and then they didn't state no name or nothing." We note that both parties read this statement rather imaginatively. Defendant Cotton argues that Frazier testified that "defendant allegedly told him that he was going to harm and/or kill witness Kenny Lockhart[.]" The prosecution argues, "a defendant's threat against a witness is generally admissible." But Frazier did not testify that defendant Cotton stated that he was going to kill or harm Lockhart, nor does it indicate that defendant Cotton threatened Lockhart. In his brief on appeal, defendant Cotton himself describes the evidence as concerning "[d]efendant's possible desire to commit unrelated crimes." A mere desire is not another "crime, wrong, or act" as described in MRE 404(b). Accordingly, the testimony, as quoted directly from the transcript and not as paraphrased by either party, did not constitute evidence of other "crimes, wrongs or acts." Therefore, the prosecutor did not act in bad faith by eliciting this testimony from Frazier.

B. Voir Dire Remarks

Defendant Cotton next argues that the prosecutor made improper remarks during voir dire. Specifically, he complains of the following remarks:

> *MR. WAGNER*. Now, if I reached into my pocket and I was looking for the mate to this pen and knew I had it when I sat at this desk and I knew the only other person that was there was Mr. Hall and I know because I saw him looking at my pen earlier, I know Mr. Hall took my pen and in a fit of rage I just got upset, I reached over and I grabbed the chair and started pounding him on the head with it, what do you suppose is going to happen . . . ? I would be sitting in the courtroom probably, correct, and a judge would be instructing potential jurors as yourself that I am presumed to be what?

THE JURORS. Innocent.

MR. WAGNER. That's right. So it doesn't mean that I haven't done anything. It just means that you cannot consider that until you have all of the evidence and the judge tells you to retire to the deliberation room and consider all of the evidence. Would everyone agree with that.

THE JURORS. Yes.

We find this comment does not constitute plain error affecting defendant's substantial rights. The trial court correctly instructed the jury on the presumption of innocence. The trial court also instructed the jury that it should look to the court, not the attorneys, for instructions on the law.

III. Sentence

Defendant Cotton next argues that his life sentence violates the Michigan constitution because it is a determinate[2] sentence and because it constitutes cruel or unusual punishment. We disagree. We review constitutional issues de novo. *People v White*, 212 Mich App 298, 304-305; 536 NW2d 876 (1995).

Defendant Cotton's sentence of life imprisonment without the possibility of parole is statutorily mandated. MCL 750.316; *People v Anderson*, 209 Mich App 527, 539; 531 NW2d 780 (1995). A mandatory nonparolable life sentence for first-degree premeditated murder is constitutional. *People v Snider*, 239 Mich App 393, 426; 608 NW2d 502 (2000); *People v Cooper*, 236 Mich App 643, 661; 601 NW2d 409 (1999). Furthermore, our Supreme Court has expressly ruled that a mandatory life sentence without the possibility of parole for an adult is not cruel or unusual punishment. *People v Hall*, 396 Mich 650, 657-658; 242 NW2d 377 (1976); see also *People v Launsburry*, 217 Mich App 358, 363; 551 NW2d 460 (1996). Accordingly, we reject defendant Cotton's argument that his sentence is unconstitutional.

IV. Sufficiency of the Evidence

Defendant Legion argues that the prosecution presented insufficient evidence to sustain his conviction of first-degree murder. Specifically, defendant Cotton argues that there was no evidence to identify him at the scene. We disagree.

In reviewing a sufficiency of the evidence claim, this Court reviews the evidence de novo in the light most favorable to the prosecution in order to determine whether a rational trier of fact could find the essential elements of the crime were proven beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000). "The standard of review is deferential: a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict. *Id.* at 400. Circumstantial evidence and reasonable inferences drawn

[2] Defendant's statement of this issue presented indicates that the sentence is unconstitutional because it is "indeterminate." But in his analysis, he argues that it is unconstitutional because it is determinate. Because we consider this a clerical error, we address defendant's issue as argued.

from the evidence can constitute satisfactory proof of the elements. *Id.*; *People v Lee*, 243 Mich App 163, 167-168; 622 NW2d 71 (2000).

To convict a defendant of first-degree murder, the prosecution must prove that the killing was intentional and that the act of killing was accompanied by premeditation and deliberation on the part of the defendant. MCL 750.316(1)(a); *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). Here, defendant Legion only argues that he was not identified as the perpetrator. Based on our review of the record, we find that Lockhart identified defendant Legion as one of the men involved in the shooting that resulted in the death of McIntyre. This Court will not interfere with the jury's role of determining the weight of the evidence or the credibility of the witnesses. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748 (1991), mod 441 Mich 1201 (1992). Lockhart's testimony, along with the other circumstantial evidence, was sufficient to allow a rational trier of fact to find that defendant Legion committed first-degree murder.

V. Ineffective Assistance of Counsel

Defendant Legion next argues that his defense counsel was ineffective for failing to call Devonte Parks[3] and an expert in eyewitness testimony. We disagree.

Our review of this claim is limited to mistakes apparent on the record because defendant Legion did not move for a new trial or a *Ginther*[4] hearing. *People v Werner*, 254 Mich App 528, 534; 659 NW2d 688 (2002). To successfully assert a claim of ineffective assistance of counsel a defendant must show that his counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant that he was denied the right to a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). To establish such prejudice the defendant must show there was a reasonable probability that, but for his counsel's error, the result of the proceeding would have been different. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996). The burden is on the defendant to produce factual support for his claim of ineffective assistance of counsel *People v Hoad*, 460 Mich 1, 6; 594 NW2d 57 (1999).

It is well established that a trial counsel's decisions on the witnesses to be called and the evidence to be presented are matters of trial strategy. *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997). That a particular strategy failed does not render its use ineffective assistance of counsel. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001). Defendant Legion has not met his burden of showing that defense counsel's decision not to call these witnesses constituted error rather than trial strategy.

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[3] Parks, who also faced charges related to this incident, was initially going to be tried separately, but the charges were ultimately dropped.

[4] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

VI. Statement of Non-testifying Codefendant

On appeal, defendant Legion asserts that defendant Cotton's statement was admitted in violation of his right to confrontation. We disagree.

A statement against penal interest, admissible as substantive evidence under MRE 804(b)(3), does not violate the Confrontation Clause if the prosecutor establishes that the declarant is unavailable as a witness and the statement bears adequate indicia of reliability or falls within a firmly rooted hearsay exception. *People v Poole*, 444 Mich 151, 162-165; 506 NW2d 505 (1993). Applying the *Poole* factors, the trial court did not err in admitting the statement. Defendant Cotton voluntarily made the statement to Frazier, who was known as "Old School," while requesting legal advice. Defendant Cotton did not minimize his role, or shift the blame onto defendant Legion. There is no indication that the statement was made for revenge, or that defendant Cotton had a motive to lie. Therefore, the trial court correctly determined that the statement bore adequate indicia of reliability.

Even if the trial court did err in admitting the statement, the error was harmless. A denial of the right to confrontation is subject to harmless-error analysis. *Carines, supra* at 774; *People v Kelly*, 231 Mich App 627, 644; 588 NW2d 480 (1998); *People v Anderson (After Remand)*, 446 Mich 392, 404-407; 521 NW2d 538 (1994). Factors to be weighed in determining whether an error is harmless in a right to confrontation issue include "the importance of the witness' testimony, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness, the extent of cross-examination otherwise permitted, and the overall strength of the prosecution's case." *Kelly, supra* at 644-645. Defendant Cotton did not identify defendant Legion in his statement, nor did Frazier's testimony implicate defendant Legion in any way. The trial court correctly noted this fact when defendant Legion's attorney moved for directed verdict. We agree with the trial court's finding that although defendant Cotton's statement to Frazier did not provide any evidence against defendant Legion, Lockhart's testimony did. Therefore, even if the statement was erroneously admitted, the error was harmless.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Mark J. Cavanagh
/s/ Michael J. Talbot